Supreme Court, U.S.
FILED
MAR 18 2011
OFFICE OF THE CLERK

No. 10-1031

IN THE
Supreme Court of the United States

NATIONAL CORN GROWERS ASSOCIATION, ET. AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET. AL.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

BRIEF OF AMERICAN CHEMISTRY COUNCIL, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AMERICAN BEVERAGE ASSOCIATION, AND GROCERY MANUFACTURERS ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DAVID B. SALMONS
Counsel of Record
CHUCK KNAUSS
RAECHEL K. ANGLIN
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
(202) 373-6283
david.salmons@bingham.com

Counsel for Amici Curiae

QUESTION PRESENTED

For nearly forty years, the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. § 346a(g)(2)(B), has required the Environmental Protection Agency (EPA) to hold a public evidentiary hearing before taking certain major agency actions, when a party objects to the proposed action and satisfies what the agency itself has described as "summary judgment-type procedures" that, among other things, require a hearing to resolve "disputed material factual issues." 74 Fed. Reg. 59,608, 59,623 (Nov. 18, 2009); see 40 C.F.R. § 178.32(b). During that time, EPA has never held such a hearing.

In this case, EPA refused to hold such a hearing before revoking the tolerances for—and thus effectively banning—a pesticide that has been used safely for decades, even though petitioners filed timely objections supported by ample expert data and other evidence calling into serious question the agency's findings on several material issues of fact. The District of Columbia Circuit upheld EPA's decision, holding that review of such a denial is highly deferential, that—paradoxically—the existence of an expert dispute over a critical factual issue was "fatal" to petitioners' request for a hearing, and that the agency properly refused to consider various objections based on "Catch-22" timing considerations.

If a hearing is not required under the FFDCA in this type of case, then as a practical matter the Act's hearing requirement is illusory. The question presented is whether the District of Columbia Circuit—in conflict with the decisions of this Court and other circuits, as well as with the agency's own regula-

tions—has properly construed the FFDCA's hearing requirement and related rules.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 4

ARGUMENT 4

I. ADMINISTRATIVE AGENCY HEARINGS BEFORE A NEUTRAL FACTFINDER ARE ESSENTIAL TO DUE PROCESS 4

II. THE COURT OF APPEALS' OPINION UNDERMINES DUE PROCESS BY EVISERATING ANY MEANINGFUL RIGHT TO A HEARING UNDER 21 U.S.C. § 346A 7

III. THE COURT OF APPEALS' OPINION LIKELY WILL NEGATIVELY IMPACT INDUSTRY IN THE UNITED STATES 11

A. American Industry Relies On The Right To A Hearing As A Fundamental Component Of The Administrative State. 12

B. This Court's Review Is Warranted Because Numerous Governmental Agencies Employ A "Summary Judgment-type" Procedure When Determining Whether To Grant A Hearing 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson Nat'l Bank v. Luckett,
321 U.S. 233 (1944) 5

Brock v. Roadway Exp., Inc.,
481 U.S. 252 (1987) 4

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 5

Edison Pharm. Co. v. FDA,
513 F.2d 1063 (D.C. Cir. 1975) 9

FCC v. Pottsville Broadcasting Co.,
309 U.S. 134 (1940) 6

Giant Food, Inc. v. FTC,
322 F.2d 977 (D.C. Cir. 1963) 6, 10

Goldberg v. Kelly,
397 U.S. 254 (1970) 4

Hynson, Westcott & Dunning, Inc. v. Richardson,
461 F.2d 215 (4th Cir. 1972) 13

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Mathews v. Eldridge,
424 U.S. 319 (1976) 4-5

Nat'l Corn Growers Ass'n v. EPA,
613 F.3d 266 (D.C. Cir. 2010) 3, 4

Perry v. Leeke,
488 U.S. 272 (1989) 5

Weinberger v. Hynson, Westcott & Dunning, Inc.,
412 U.S. 609 (1973) 4, 8

STATUTES

5 U.S.C. § 556 5

7 U.S.C. § 136d 14

21 U.S.C. § 234 13

21 U.S.C. § 321 12

21 U.S.C. § 335a 12

21 U.S.C. § 335c 12

21 U.S.C. § 344 13

21 U.S.C. § 346a 4, 7, 11

TABLE OF AUTHORITIES
(continued)

Page(s)

21 U.S.C. § 348 14

21 U.S.C. § 355 13

21 U.S.C. § 360e 14

Legislative History

S. Rep. No. 752 (1945) 5

H. R. Rep. No. 1980 (1946) 6

INTEREST OF THE AMICI[1]

American Chemistry Council ("ACC"), is a trade organization that represents the leading companies engaged in the business and science of chemistry to make innovative products and services that make people's lives better, healthier and safer. Its members include organizations and companies doing business in the United States including companies interested in preserving procedural safeguards in chemical registration and cancellation actions. *See* ACC's website, http://www.americanchemistry.com.

The National Association of Manufacturers ("the NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a non-profit association that represents the country's leading research-based pharmaceutical and biotechnology

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for the amici curiae represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.
Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief.

companies.[2] PhRMA advocates in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines for patients by pharmaceutical and biotechnology research companies. In support of that mission, PhRMA's members invested over $300 billion in the last decade to develop new medicines. *See* PhRMA, Pharmaceutical Industry Profile 2010, at 44 (2010). In 2010 alone, PhRMA members invested approximately $49.4 billion (of an industry total of approximately $67.4 billion) in discovering and developing new medicines.[3] PhRMA closely monitors legal issues that impact the pharmaceutical industry and has regularly participated as amicus curiae in cases before the Court. *See, e.g., Graham Cnty. Soil & Water Conservation Dist.*, 129 S. Ct. 2824 (2010); *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems (Stanford v. Roche)* (No. 09-1159) (merits amicus brief submitted Feb. 1, 2011); *Astra USA, Inc. v. County of Santa Clara* (No. 09-1273) (merits amicus brief submitted Nov. 19, 2010); *Matrixx Initiatives v. Siracusano* (No. 09-1156) (merits amicus brief submitted Aug. 27, 2010).

American Beverage Association represents the broad spectrum of companies that manufacture and distribute non-alcoholic beverages in the United States. It has more than 1,700 member companies that employ more than 208,000 people across the

---

[2] A list of PhRMA's members can be found at http://www.phrma.org/about/member-companies.

[3] Burrill & Company, analysis for PhRMA, 2011 (includes PhRMA research associates and nonmembers); Pharmaceutical Research and Manufacturers of America, PhRMA Annual Member Survey (Washington, DC: PhRMA, 2010–2011).

country. These companies market hundreds of products including regular and diet soft drinks, bottled water and water beverages, 100 percent juice and juice drinks, sports drinks, energy drinks and ready-to-drink teas.

The Grocery Manufacturers Association ("GMA") is the largest association of food, beverage, and consumer product companies in the world. Its members employ more than 2.5 million workers in all fifty States, with United States sales totaling over $460 billion annually. GMA leads efforts to increase growth and productivity in the food and beverage industry, and also works to promote the safety and security of the Nation's food supply. The organization applies legal, scientific, and political expertise from its member companies to vital public policy issues affecting the industry, and speaks for food and consumer product manufacturers at the State, federal, and international levels on legislative and regulatory issues.

Together, the amici curiae represent a broad spectrum of American industry. They are concerned that the United States Court of Appeals for the District of Columbia's opinion in *National Corn Growers Association v. EPA*, 613 F.3d 266 (D.C. Cir. 2010), threatens the right to a hearing to determine disputed issues of material fact, which is frequently required by statute and is a fundamental component of due process in the administrative state.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the District of Columbia's opinion in *National Corn Growers Association v. EPA*, 613 F.3d 266 (D.C. Cir. 2010), eviscerates the right to a hearing under 21 U.S.C. § 346a(g)(2)(B). *See* Pet. App. 1a-15a. The EPA's own implementing regulations direct the agency to evaluate whether to grant a hearing with a "summary judgment-type" procedure. Pet App. 432a-433a; *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622 (1973). Yet, the Court of Appeals' opinion allows the EPA to deny a hearing, even when faced with disputed material facts. Furthermore, the Court of Appeals' opinion approved of the EPA's "Catch 22" timing rules, allowing the EPA to accept or reject evidence at will. Because the right to a hearing is fundamental to a well-informed, equitable administrative process, the question presented is of exceptional importance. Accordingly, the amici curiae respectfully submit that this Court's review is warranted, and the Court of Appeals' judgment should be reversed.

ARGUMENT

I. ADMINISTRATIVE AGENCY HEARINGS BEFORE A NEUTRAL FACTFINDER ARE ESSENTIAL TO DUE PROCESS.

It is beyond contest that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). *See also Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 261 (1987) (stating that "the fundamental requirement of due process is the opportunity to be heard") (citation omitted); *Mathews v. Eldridge*, 424

U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (citation omitted); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 246 (1944) (stating that "[t]he fundamental requirement of due process is an opportunity to be heard").

Accordingly, evidentiary hearings before neutral factfinders are the heart of the due process guarantee. A hearing is the key forum for "balancing . . . the competing interests at stake" in a given dispute and resolving disputed issues of material fact. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Hearings permit a thorough vetting of contested facts and theories through cross-examination. *See Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989) ("The age-old tool for ferreting out truth in the trial process is the right to cross-examination. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law.") (quoting 5 WIGMORE EVIDENCE § 1367 (Chadbourn rev. 1974).

Like judicial hearings, administrative agency hearings are key forums for uncovering truth and ensuring a just result. In an administrative agency hearing, contested ideas are challenged, weighed, and measured. As the Administrative Procedure Act provides, "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). *See also* S. Rep. No. 752, 79th Cong., 1st Sess., at 23 (1945) (stating that "[t]o the extent that cross-examination

is necessary to bring out the truth, the party should have it"); H. R. Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946) (stating that "[t]o the extent that cross-examination is necessary to bring out the truth, the party must have it").

Due process necessitates that, where appropriate, administrative agencies hold hearings to review evidence and hear argument in order to resolve disputed issues of material fact. Without the procedural safeguards afforded by a hearing before a neutral factfinder, administrative agencies would be free to act — and indeed, may be unable to avoid acting — in a short-sighted and under-informed manner. To guard against such an inevitability, Congress has provided for administrative agencies to hold public hearings to address disputed issues of material fact.

As this Court has stated, "the laws under which [administrative] agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143-44 (1940). Because administrative agencies are, "at once, the accuser, the prosecutor, the judge and the jury, [administrative agencies] must remain alert to observe accepted standards of fairness." *Giant Food, Inc. v. FTC*, 322 F.2d 977, 984 (D.C. Cir. 1963) (citation omitted). To that end, "reviewing courts must . . . be alert to ascertain that the true substance of a fair hearing is not denied to a party." *Id.*

II. THE COURT OF APPEALS' OPINION UNDERMINES DUE PROCESS BY EVISERATING ANY MEANINGFUL RIGHT TO A HEARING UNDER 21 U.S.C. § 346A.

In the Federal Food, Drug and Cosmetics Act ("FFDCA"), Congress provided that the EPA would hold public hearings to resolve factual disputes relevant to proposed agency action. Pet App. 405a. The FFDCA requires the EPA to hold a hearing "if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections" to a Final Regulation published by the agency. *Id.*

The EPA's own implementing regulations provide as follows:

> A request for *an evidentiary hearing will be granted* if the Administrator determines the material submitted shows the following:
>
> (1) There is a *genuine and substantial issue of fact* for resolution at a hearing. An evidentiary hearing will not be granted on issues of policy or law.
>
> (2) There is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor . . . An evidentiary hearing will not be granted . . . if the Administrator concludes that the data and information submitted, even if accurate, would be insufficient to justify the factual determination urged.

> (3) Resolution of the factual issue(s) in the manner sought . . . would be adequate to justify the action requested. An evidentiary hearing will not be granted on factual issues that are not determinative with respect to the action requested.

Pet. App. 432a-433a (emphasis added). Thus, the EPA must hold a hearing when an objection raises a material issue of fact.

The EPA has recognized that the determination whether it must hold a hearing is akin to a "summary judgment-type" procedure. Pet. App. 82a-83a. As the EPA has stated, "Congress confirmed EPA's authority to use summary judgment-type procedures with hearing requests when it amended FFDCA section 408 in 1996." Pet. App. 83a. *See also Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622 (1973) (approving the FDA's use of a summary judgment procedure to determine when to hold a hearing); Pet. App. 6a ("The parties agree the FFDCA and the EPA's regulations establish a 'summary-judgment type' standard for determining whether to hold a hearing: The EPA must hold a hearing if it determines an objection raises a material issue of fact.").

Given that the EPA has recognized that a "summary judgment-type" procedure is appropriate for determining whether to hold a hearing, one might assume that the EPA consistently holds hearings whenever an objection raises a material issue of fact. But, in actuality, the EPA has not held a hearing in forty years. It is inconceivable that no objection has raised a single issue of material fact warranting a

hearing in that extended period. While the EPA has recognized that a "summary judgment-type" procedure is appropriate, the EPA has failed to employ such a procedure. The inescapable conclusion is that the EPA is steadfastly refusing to follow both Congress' direction and its own implementing regulations.

As the United States Court of Appeals for the District of Columbia previously stated with respect to the FDA's consistent failure to grant evidentiary hearings: "In our eyes, this failure to grant a hearing to any applicant casts doubt upon the good faith we would ordinarily impute without question to a decision" of the agency. *Edison Pharm. Co. v. FDA*, 513 F.2d 1063, 1072 (D.C. Cir. 1975). In *Edison*, the court was duly concerned that the FDA had not granted a request for a hearing on a new drug application in approximately *three years*. *Id.* The EPA's failure to grant an evidentiary hearing in *forty years* should warrant far greater heightened skepticism here. Yet, in contrast with its prior opinion, in this case, the Court of Appeals has greatly enabled EPA's lawless refusal to hold required evidentiary hearings.

If there will ever be a case raising material factual disputes that warrant a hearing, this is it. The law is clear that when there is a disputed issue of material fact, the EPA is required to hold a hearing before revoking a tolerance for a pesticide. *See* Pet. App. 405a. In this case, a hearing was explicitly required by statute. *Id.* Petitioners presented the EPA with numerous consequential disputed issues of fact regarding the tolerance revocation at issue. For example, the EPA decided to revoke the tolerance for the pesticide on the basis of an entirely unrealistic

assumption — that the pesticide would be applied to 100% of the crops in any given watershed. Pet App. 7a. In stark contrast, as the petitioners sought to demonstrate, the pesticide would only be applied to 4.25% of crops in any watershed. *Id.* Additionally, petitioners submitted comments demonstrating that, in contrast to the EPA's conclusion, the pesticide exposure levels in surface and ground waters were safe. *Id.* at 11a-12a. But the petitioners were denied a hearing. The EPA's actions fail to demonstrate even rudimentary fairness. *Giant Food, Inc.*, 322 F.2d at 984.

Yet, rather than provide any meaningful review of the EPA's conduct in this regard, the Court of Appeals adopted a "necessarily deferential" standard and affirmed. Pet. App. 7a, 15a. The Court of Appeals merely reviewed whether the EPA afforded "adequate consideration to all relevant evidence." Pet. App. 7a. Furthermore, the Court of Appeals did not engage in any meaningful review of whether the EPA correctly applied the "summary judgment-type" procedure. Rather, in direct contradiction of summary judgment standards, the Court of Appeals held that the very presence of competing expert opinions was "fatal" to petitioners' request for a hearing. Pet. App. 13a.

In addition, the Court of Appeals approved of the EPA's "Catch 22" timing rules, allowing the EPA to accept or reject evidence at will. The Court of Appeals not only allowed the EPA to discount as "recycled" arguments first presented before the EPA's proposed revocation order, but also to reject as "untimely" arguments first presented after the EPA's revocation order. Pet. App. 8a, 10a. The EPA's behavior in this regard was arbitrary and unreasona-

ble, and its approval by the Court of Appeals independently warrants this Court's review.

Most fundamentally, by permitting the agency to "consider" evidence and determine factual disputes without holding a hearing, the Court of Appeals has eviscerated the hearing requirement in 21 U.S.C. § 346a. The Court of Appeals' reasoning impermissibly grants federal agencies license to ignore express congressional mandates and their own express implementing regulations.

III. THE COURT OF APPEALS' OPINION LIKELY WILL NEGATIVELY IMPACT INDUSTRY IN THE UNITED STATES.

The Court of Appeals' opinion likely will have a significant negative impact on American industrial concerns. Federal administrative agencies wield substantial power to regulate industry in the United States. Corporations rely on administrative agencies to provide a fair process prior to issuing regulations that may hamper or entirely preclude the development, production, and sale of all kinds of goods.

Through the comment and objection processes, industrial concerns are able to offer a wealth of practical experience and sector expertise to administrative agencies, positively influencing the development of federal regulations. But sometimes, the comment and objection processes are insufficient to permit full consideration of competing evidentiary claims. In recognition of this reality, Congress has provided — in certain circumstances — that administrative agencies should resolve material factual disputes through administrative hearings. American industry relies on such hearings to safeguard their interests in a broad range of regulatory contexts.

A. American Industry Relies On The Right To A Hearing As A Fundamental Component Of The Administrative State.

Congress has woven the right to a hearing into the very fabric of the administrative state. The right to a hearing protects American industry and consumers from misinformed, ill-conceived regulation of a staggering array of products, including medical devices, prescription drugs, food and food additives, cosmetics, and consumer goods. Through participating in hearings, corporations are able to contribute a wealth of industry insight and practical experience to regulators. Even a cursory review of examples taken solely from the FFDCA demonstrates that hearings are a fundamental component of the administrative state, upon which myriad industrial concerns must rely.

For example, the pharmaceutical industry relies on hearing rights related to new drug applications.[4]

---

[4] Correspondingly, the generic pharmaceutical industry relies on its hearing rights as to abbreviated new drug applications. An abbreviated new drug application "relies on the approved application of another drug with the same active ingredient to establish [its] safety and efficacy." 21 U.S.C. § 321. Congress has provided for a hearing following the denial of an abbreviated drug application based upon debarment. 21 U.S.C. § 335a(f)(3) (stating that "the Secretary shall provide . . . an opportunity for an informal hearing, to be held . . . on the decision of the Secretary to refuse approval of an abbreviated drug application"). Congress has also required a hearing before the FDA may withdraw approval for an abbreviated new drug application. 21 U.S.C. § 335c(b) (stating that the Secretary may not withdraw approval for an abbreviated drug application, on certain grounds, "unless the Secretary has issued an order for such action made on the record after opportunity for an agency hearing on disputed issues of material fact").

The research-based biopharmaceutical industry relies on the right to hearings "on the question whether such application is approvable." 21 U.S.C. § 355(c)(1)(B).

Innovator biopharmaceutical companies also rely on the right to a hearing prior to withdrawal of approval for a new drug application. *Id.* at § 355(e). As the Fourth Circuit held in *Hynson, Westcott & Dunning, Inc. v. Richardson*, 461 F.2d 215, 220 (4th Cir. 1972) as to 21 U.S.C. § 355(e), "[n]either due process nor the Administrative Practice Act permits an arbitrary denial [of a hearing] in any case where it can be fairly said there are genuine and substantial issues of fact in dispute."[5]

The food industry also relies on hearing rights provided by Congress. Congress has provided for a hearing when an allegedly adulterated or misbranded food product has been detained. 21 U.S.C. § 234(h)(4)(A) ("With respect to an article of food ordered detained . . . any person who would be entitled to be a claimant for such article . . . may appeal the order to the Secretary . . . the Secretary, after providing opportunity for an informal hearing, shall confirm or terminate the order").

Similarly, Congress has provided for a hearing prior to the reinstatement of a permit related to the manufacturing, processing, or packaging of food. 21 U.S.C. § 344(b) ("The Secretary is authorized to suspend immediately upon notice any permit . . . the Secretary shall, immediately after prompt hearing and an inspection of the establishment, reinstate

---

[5] The Court of Appeals' opinion directly conflicts with the Fourth Circuit's holding in *Hynson*, 461 F.2d at 220.

such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit, as originally issued or as amended.").

Further, the food industry relies on its hearing rights as to the regulation of food additives. 21 U.S.C. § 348(f)(1) ("Within thirty days after publication of an order [regarding the regulation of food additives], any person adversely affected by such an order may file objections . . . and request[] a public hearing upon such objections. The Secretary shall, after due notice, as promptly as possible hold such public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections.").

Manufacturers and distributors of medical devices also rely on hearing rights provided by Congress. For example, the industry relies on hearing rights related to both the premarket approval of medical devices and recall. *See* 21 U.S.C. § 360e(e) (providing hearing right related to premarket approval of a medical device); *id.* at § 360h(e)(1) (providing hearing right related to the recall of a medical device).

The pesticide industry relies on other hearing rights in addition to the hearing right at issue in this case. For example, the industry relies on hearing rights related to the cancellation or reclassification of a pesticide's registration. *See* 7 U.S.C. § 136d(b)(2) (providing for "a hearing to determine whether or not [a pesticide's] registration should be canceled or its classification changed").

Such hearing rights provide American industrial concerns assurance that their interests will not be subjected to arbitrary or ill-considered regulation.

Thus, it is of considerable importance to American industry that the right to a hearing be upheld. Because the Court of Appeals' opinion undermines this fundamental right to a hearing, the Court of Appeals' opinion should be reversed.

B. This Court's Review Is Warranted Because Numerous Governmental Agencies Employ A "Summary Judgment-type" Procedure When Determining Whether To Grant A Hearing.

In addition to generally undermining the right to a hearing, the Court of Appeals' opinion renders meaningless the "summary judgment-type" procedure used by the EPA to determine whether to hold a hearing. Worse, the damage wrought by the Court of Appeals' opinion likely will not be limited to that agency's actions.

Numerous other governmental agencies employ just such a "summary judgment-type" procedure in determining whether to hold a hearing. For example, the Food and Drug Administration employs a "summary judgment-type" procedure in determining whether to hold a hearing to resolve objections to certain regulations issued pursuant to the Fair Packaging and Labeling Act. 21 C.F.R. § 12.24 ("A request for a hearing will be granted if the material submitted shows . . . a genuine and substantial issue of fact for resolution at a hearing.").

The National Oceanic and Atmospheric Administration employs a "summary judgment-type" procedure when determining whether to hold a hearing with respect to a licensee's objection to a term in a deep seabed mining permit. 15 C.F.R. § 971.900(b) (referring to "[h]earings conducted under section

105(b)(3) of the Act on objection by a licensee or permittee to any term, condition or restriction in a license or permit, or to modification thereto, where the licensee or permittee demonstrates, after final action by the Administrator on the objection, that a dispute remains as to a material issue of fact").

The United States Department of Energy employs a "summary judgment-type" procedure in determining whether to grant a "trial-type hearing" for issues regarding the authorization to import or export natural gas. 10 C.F.R. § 590.313(a) ("The Assistant Secretary or presiding official shall grant a party's motion for a trial-type hearing, if the Assistant Secretary or presiding official determines that there is a relevant and material factual issue genuinely in dispute and that a trial-type hearing is necessary for a full and true disclosure of the facts.").

The Internal Revenue Service also employs a "summary judgment-type" procedure in determining whether to grant a taxpayer a hearing to review whether the taxpayer's property should be levied. *See* 26 C.F.R. § 301.6334-1(d)(2) ("The taxpayer will be granted a hearing to rebut the Government's prima facie case if the taxpayer files an objection within the time period required by the court raising a genuine issue of material fact demonstrating that the underlying tax liability has been satisfied, that the taxpayer has other assets from which the liability can be satisfied, or that the Service did not follow the applicable laws or procedures pertaining to the levy.").

Additionally, the Department of Transportation employs a "summary judgment-type" procedure in determining whether to grant a hearing upon appli-

cation for review of air carrier agreements. *See* 14 C.F.R. § 303.42 ("Requests for a formal oral evidentiary hearing must set out with specificity the material issues of fact in dispute that cannot be resolved without such a hearing.").

As these examples demonstrate, a "summary judgment-type" procedure is employed to determine whether to grant a hearing in remarkably diverse contexts throughout the federal government. Indeed, this "summary judgment-type" procedure is engrained in our administrative jurisprudence. Thus, it is crucially important that our governmental agencies apply this standard equitably, in a manner that comports with a basic understanding of "fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

The Court of Appeals' opinion teaches that, in resolving a dispute of fact, federal agencies are free to disregard statutory requirements and their own implementing regulations and exercise unfettered discretion in determining whether interested parties will be afforded a meaningful opportunity to be heard. The Court of Appeals' opinion allows an agency to decline to properly employ a "summary judgment-type" procedure when determining whether to hold a hearing. Given the prominence of the "summary judgment-type" procedures in agency processes and the practical significance of the District of Columbia Circuit's jurisprudence to the adjudication of disputes involving agency action, the Court of Appeals' opinion poses a significant likelihood of undermining the will of Congress and the due process rights of citizens and the commercial entities they create.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted.

DAVID B. SALMONS
Counsel of Record
CHUCK KNAUSS
RAECHEL K. ANGLIN
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
(202) 373-6283
david.salmons@bingham.com

March 2011